reason, I apprehend that, even at law, it would invalidate a deed obtained from him while in that condition." See also, 1 Story Eq. Jur., sect. 231, *et seq.*; 2 Kent Com. 452, note; *Mansfield* v. *Watson*, 2 Iowa 115; *Shaw* v. *Thackray*, 1 Sm. & G. 540. Though the general doctrine of *Cooke* v. *Clayworth* seems to be well settled, especially in its application to a degree of intoxication less than excessive, there seems to be some difference of opinion as to the true interpretation of the case, as to whether a court of equity will assist a person to get rid of an agreement or deed merely upon the ground of his excessive intoxication, where there has been no unfair advantage taken of his condition, nor any contrivance or management to draw him into drink. All of the authorities now agree that equity will relieve if any unfair advantage has been taken of him, etc. The following authorities seem to favor the position that equity will not relieve merely upon the ground of intoxication (no distinction being made as to the degree thereof), in the absence of fraud, unfair advantage, etc., but will leave the party to his remedy at law: *Campbell* v. *Ketcham*, 1 Bibb 406; *White* v. *Cox*, 3 Hayw. 82; *Rutherford* v. *Ruff*, 4 Dessaus. 350: *Jones* v. *Perkins*, 5 B. Mon. 225; *Johnson* v. *Medlicott*, 3 P. Wms. 130, note *a*; *Shaw* v. *Thackray*, 1 Sm. & G. 540; *Pittenger* v. *Pittenger*, 3 N. J. Eq. 161; *Hutchinson* v. *Tindall*, 3 Id. 360; *Crane* v. *Conklin*, 1 Id. 346; 2 Kent Com. (12th ed.) 452, note *c*; 1 Pars. Cont. (6th ed.) 384, note *d*.

The following authorities, on the other hand, favor the proposition that, where the drunkenness is so excessive as to deprive a man of his reason, equity will relieve: *Mansfield* v. *Watson*, 2 Iowa 115; *Taylor* v. *Patrick*, 1 Bibb 168; *Wigglesworth* v. *Steers*, 1 Hen. & Munf. 70; *Birdsong* v. *Birdsong*, 2 Head. 289; *Belcher* v. *Belcher*, 10 Yerg. 121; *French* v. *French*, 8 Ohio 214. See also the editor's note at the end of *Cooke* v. *Clayworth*, 18 Ves. Jr. (Sumner's ed.) 18; 1 Story's Eq. Jur., sects. 231, 233, and note; Metc. on Cont. 82; *Barrett* v. *Buxton*, 2 Aik. 167; *Gore* v. *Gibson*, 13 M. & W. 623.

Perhaps the most of the authorities on this point may be reconciled on the ground that dealing with a person in a state of excessive intoxication is *prima facie* fraudulent. See *Jones* v. *Perkins*, 6 B. Mon. 225, citing 1 Story's Eq. Jur., sects. 233, 234.

As to the decision in the principal case, there can be no question as to its correctness. The only wonder is that the correctness of the judgment of the Court of Common Pleas should have been questioned.

M. D. EWELL.

Chicago.

Supreme Court of Ohio.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY *v.* SPANGLER.

The liability of railroad companies for injuries caused to their servants by the carelessness of other employees, who are placed in authority and control over them, is founded upon consideration of public policy, and it is not competent for a railroad company to stipulate with its employees at the time, and as part of their contract of employment, that such liability shall not attach to it.

ERROR to District Court, Lucas county.

Spangler, the defendant in error, was a brakeman on a freight

train of the Lake Shore & Michigan Southern Railway Company. While in the line of his duty he was injured, without his fault, and by reason of the negligence of the conductor of the train. He brought his action for damages for the injury so received. The company alleged for defence, among other things, "that at the time of the hiring of plaintiff by defendant as a brakeman upon her trains of cars, as in the petition alleged, and as a part of the terms of said hiring, and in consideration thereof, plaintiff entered into an agreement and stipulation in writing with" Spangler, which contained the following stipulation: "*Second*, that while the company will be responsible to me for the discharge of all its duties and obligations to me, and for any fault or neglect of its own, or of its board of directors or general officers, which are the proximate cause of injury, yet it will not be responsible to me for the consequences of my own fault or neglect, or that of any other employees of the company, whether they or either of them are superior to me in authority, as conductor, foreman, or otherwise, or not." The evidence tended to support this defence. The trial court refused, upon request of the company, to charge the jury that, "if the jury find from the testimony that the plaintiff, at the time he was employed by the defendant as a brakeman, executed and delivered to the defendant the stipulation, a copy of which is set out in the answer, and that the same was accepted by the defendant, by and through its proper officer or agent, then the defendant is not liable for the alleged negligence of the conductor complained of in the petition;" assigning as a reason for the refusal that, in the opinion of the court, such stipulation was not binding upon the plaintiff below, it being against public policy. A judgment of recovery by Spangler was affirmed on error in the District Court. This judgment is now sought to be reversed for alleged error in affirming the judgment of the trial court. The refusal of the latter court to charge the jury as requested is now assigned for error. Upon the question thus presented to the court rests the disposition of the case.

C. H. Scribner, for the plaintiff in error.

J. R. Seney, for defendant in error.

The opinion of the court was delivered by

OWEN, C. J.—Is it competent for a railway company to stipulate with its brakemen, at the time and as part of their contract of employment, that the company shall not be liable for the negligent

acts of its conductors? *Western, etc., Rd.* v. *Bishop*, 50 Ga. 465, is cited, with other decisions of the same court, affirming and following it, in support of the affirmation of this proposition. In that case it was held that such a contract, so far as it does not waive any criminal neglect of the company, or its principal officers, is a legal contract, and binding upon the employee. But McCoy, J., speaking for the court, says: "We do not say that the employer and employee may make any contract—we simply insist that they stand on the same footing as other people. No man may contract contrary to law, or *contrary to public policy* or good morals, and this is just as true of merchants, lawyers and doctors—of buyers and sellers, and bailors and bailees—as of employers and employees."

This invites us to inquire whether, and to what extent, the contract we are dealing with is affected by considerations of public policy. It is maintained on behalf of the company that "a rule absolving the company from liability to the brakemen for negligence of the conductor may operate to constitute the brakemen a sort of police; may induce them to be more watchful, and report to their superiors the delinquencies of the conductor; and, if they are unwilling to do this, they, and not the company, should suffer the consequences. A rule of this kind is calculated, also, to better protect the public against injuries to merchandise in course of transportation, by promoting greater diligence and watchfulness on the part of the brakemen employed upon the trains." Also that "a stipulation which would place additional responsibility upon the employee, and require, for his own protection, a close observance of the rules of the company, and a strict watch upon the couduct of his immediate superior, would tend to promote the safety of passengers and merchandise in transit." If this view is tenable, it follows that public policy is concerned in and subserved by such a contract as is here sought to be enforced. As brakeman on the train, Spangler was subject to the orders and control of the conductor.

In *Little Miami Rd.* v. *Stevens*, 20 Ohio 415, it was first held, though by a divided court, that a railroad company is liable to an employee for an injury received through the negligence of another employee, under whose control he is placed.

This principle was again considered in *Rd.* v. *Keary*, 3 Ohio St. 202, and was applied by a unanimous court to a case like the one at bar; and the railroad company was held liable to a brakeman for an injury resulting to him from the carelessness of a conductor,

under whose control he had been placed by the company. In the course of an able and exhaustive opinion, RANNEY, J., says: "The servants employed to execute cannot recover for injuries arising from a failure in that part of the business committed to them, because it is their failure, and not that of their employer; and although it should happen from the negligence of but one of them, yet each one entered the common service with a knowledge that others must be engaged, and they were jointly bound to perform what was jointly entrusted to them, and public policy may be concerned in their keeping a supervision over each other for the purpose. But how this can be made to extend to the conductor, over whose acts they have no supervision or control, and are not presumed to be possessed of the requisite intelligence for the purpose, we are wholly unable to see; and, equally so, how the safety of travellers is likely to be jeoparded by adding to the responsibility of the conductor for his carelessness that of the company that places him in power. * * * It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. * * * But they cannot be made to bear the losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

A careful examination of this case and of *Rd.* v. *Stevens*, *supra*, which it approves and follows, will make it apparent that the liability of railroad companies for injuries to their servants, caused by the carelessness of those who are superior in authority and control over them, is placed chiefly upon consideration of public policy. The doctrine established by these cases has remained unquestioned by this court for more than thirty years. It furnishes a conclusive answer to the contention of the company that the stipulation which it seeks to enforce would better protect the public by promoting greater diligence on the part of brakemen, and the consequent safety of passengers and merchandise in transit.

We are thus relieved of all discussion of the relation which the liability of railroad companies for injuries to their servants, caused by the negligence of their superiors in authority, sustains to the policy of the state. It is the firmly-established policy of our law

that such liability should attach. It follows that even *Rd.* v. *Bishop*, *supra*, which is the strongest authority cited by the company in support of its position, fails to support the view contended for. As we have seen, that case expressly declares that contracts contravening public policy will not be enforced. The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employees, stipulating that they shall not be held to a liability for the negligence of their servants, which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employees simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements.

The trial court was right in refusing the instruction requested, and the judgment is affirmed.

The question as to the extent to which an employer may limit his liability to his employee, for negligence in employing incompetent agents or workmen, or furnishing unsafe or unsuitable machinery, is one that has been adjudicated, but rarely in the higher courts.

The facts in *Western & Atlantic Rd.* v. *Bishop*, 60 Ga. 465, seem to have been similar to the facts in the principal case, and the conclusion reached exactly contrary. We confess that the reasoning of the Ohio court, regarding the Georgia case, appears lame and unsatisfactory. In the case in Georgia, the employer pleaded in defence of the action, by the injured employee's wife, a contract of which the following is part: "And it is understood between the parties, and expressly agreed, that the said Lucien J. Bishop, in consideration that the said Western and Atlantic Railroad Company will hire and pay him the wages stipulated, will take upon himself all risks connected with or incident to his position on the road, and will, in no case, hold the company liable for any injury or damage he may sustain on his person or otherwise, by what are called accidents or collisions on the train or road, or which may result from the negligence, carelessness or misconduct of himself or another employee or person connected with said road, or in the service of said company." The court said, "A common carrier is not strictly a private person. He undertakes to deal with the public, and the law considers the rules applicable to him, as rules affecting the public interest. And it is upon this ground that the cases go which, while they recognise the right of a carrier to limit his liability so far as he is an insurer, at the same time deny his right, even by special contract, to stipulate that he shall not be liable for negligence of himself or servants. * * * For these reasons the contract of a common carrier, is an exception to the general rule 'that men must be permitted to make their own agreements, and that it is no concern of the public, on what terms an individual chooses to contract.' None of this reasoning applies to the case before us. This suit is not against the railroad company as a carrier. The husband of the plaintiff was one of the agents by whom the defendant was exercising the employment of a common carrier. His relation to

the company was strictly a private one. His contract of service was a free one. He did not stand in the situation of a traveller or shipper of goods, who cannot stop to higgle or refuse to go on or to ship his goods.

"The railroad company has no monopoly of service. It is only one of a million of employers with whom the husband of plaintiff might have sought employment. He deliberately, and for a consideration undertook what he knew to be dangerous service, and contracted that he would not hold the company liable for the negligence of its servants, or even for the negligence of the company, itself. * * * Nothing in the contract can, therefore protect the company, when the negligence which has caused the damage, is a crime, when it comes within that kind of negligence which is called in section 4291 of the Code (1873), criminal negligence, recklessness of human safety and human life. That sort of negligence is forbidden by law, and punishable by law as penal. It is contrary to good morals and to public policy, as declared by law."

So much of the above as excludes from the consideration of cases like these, as authorities, all cases passing upon the right of common carriers to limit their liability, as common carriers, seems to us logically conclusive.

In a later case, the Georgia court declared that a contract similar to the above, would protect the employer from recovery by an employee, for injuries sustained from the negligent running of a train over the road of another company: *Galloway* v. *Western & Atlantic Rd.*, 57 Ga. 512.

The same court, in discussing the right of the employee's wife to recover for his homicide, where he had entered into such an agreement, declared: "And under the view we have taken of the rights of the wife, that she must show a violation of some duty the company owed to her husband, we think she is bound by the relation they had established between themselves by contract not illegal, that the wrong she sues for must be a legal wrong, a wrong which the law recognises as a breach of some of the duties the road owed to her husband, that she stands in his shoes, has his rights, and takes his responsibilities:" *W. & A. Rd.* v. *Strong*, 52 Ga. 461; *Hendricks* v. *W. & A. Rd.*, Id. 467.

The doctrine of the above cases seems to be recognised as the law in England: *Griffith* v. *Earl of Dudley*, 9 Q. B. Div. 357; s. c. 26 Alb. L. Jour. 43.

In a *nisi prius* case in Pennsylvania, it was said that a clause in the printed rules of a railroad company, given to the employee at the time of his employment, to the effect that "the regular compensation will cover all risk or liability from any cause whatever in the service of the company," would protect the company from an action for injuries received from the company's negligence: *Mitchell* v. *Penn. Rd.*, 1 Am. Law Reg. (O. S.) 717. This case is of little authority, however, as it appears to have been decided on other grounds.

In 1876, the Georgia legislature passed an act making any act of commission of negligence, or omission of duty by any agent or employee of a railroad company, criminal negligence, when resulting in the serious injury of any person; and under this law, contracts like those in the former Georgia cases are void as against public policy: *Cook* v. *W. & A. Rd.*, 72 Ga. 48.

On the other hand, one of the federal courts has declared in favor of the principal case. In a suit brought by the administrator of an employee, killed through the use of defective machinery, where a contract absolving the employer from damages arising from negligence was sought to be used as a defence, GRESHAM, J., said: "When the defendants' negligence in supplying his employee with unsafe machinery has caused the death of the latter, the law

will not allow the defendant to say as in effect he does say in his answer: 'It is true that my machinery was defective and unsafe and my negligence caused the death of my employee, but I am not liable to those who have suffered from the loss of his life, because I had a contract with my employee, which secured to me the right to supply him with defective and unsafe machinery and to be negligent.' Such a contract is void as against public policy:" 10 Bissell 486; s. c. 8 Fed. Rep. 782; s. c. criticized 24 Alb. L. Jour. 383.

Under a statute in Kansas, railroad companies are liable for injuries received by an employee, though due to the negligence of a fellow-servant. In defence of an action of this nature, a railroad company introduced a contract in substance like those given above. The court said: "Now if the statute was enacted for the better protection of the life and limb of railroad employees, it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when we consider the unequal situation of the laborer and his employer. * * * The state has such an interest in the lives and limbs of its citizens, that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith:" *Kan. Pac. Ry.* v. *Peavey*, 29 Kas. 169.

In *Memphis & Charleston Rd.* v. *Jones*, 2 Head (Tenn.) 517, it was held that such a contract would not protect the employer from the wilful negligence of an engineer, resulting in the killing of a slave.

We are inclined to believe that the doctrine declaring contracts of the nature of those given above, void as against public policy, is correct.

The employees of corporations, especially, are at great disadvantage in making contracts of this nature, and arguments based on the absolute freedom and equality of the contracting parties are simply "fine talk." That such contracts tend to lessen the vigilance of employers, seems but natural, while that they tend to quicken the employee's attention to duty, is, at best, very doubtful. "We do not think it likely that persons would be careless of their lives, and persons and property, merely because they might have a right of action to recover for what damage they might prove they had sustained. If men are influenced by such remote considerations to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation, that in any extensive business where many persons are employed, the care and prudence of the employer is the surest guaranty against mismanagement of any kind. The employer would, we think, be much more likely to be careless of the persons of those in his employ, since his own safety is not endangered by any accident, when he would understand that he was not pecuniarily liable for the careless conduct of his agents:" *Little Miami Rd.* v. *Stevens*, 20 Ohio 415. See also, 1 Cent. L. Jour. 485; 2 Thomp. Neg. 1025.

CHAS. A. ROBBINS.

Lincoln, Neb.